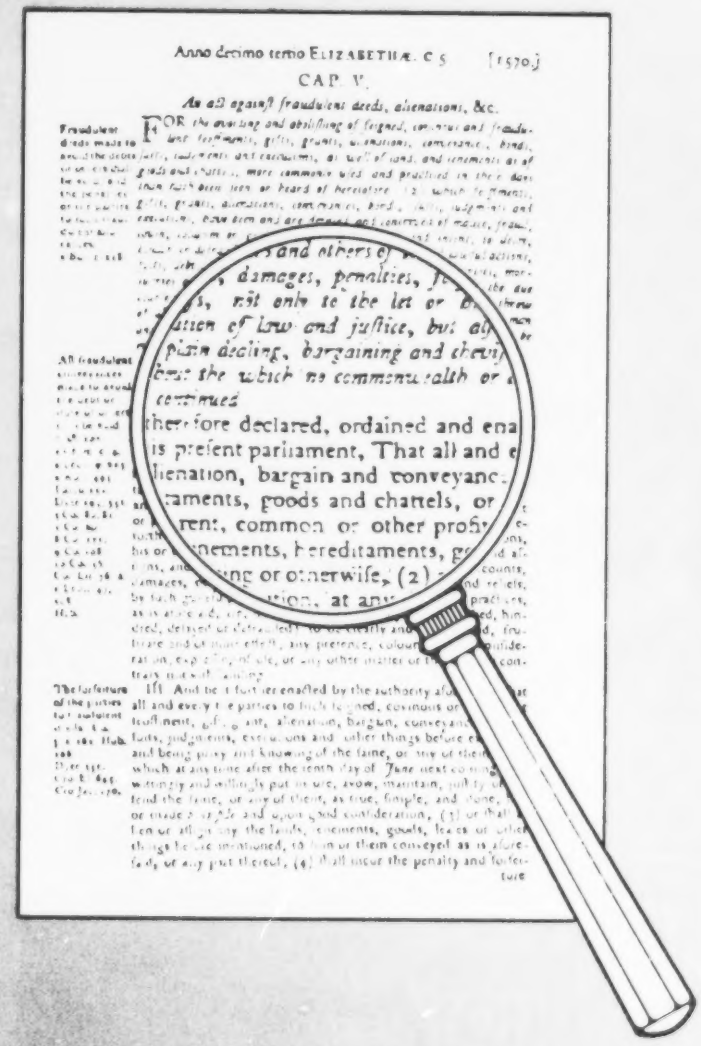
Law Reform Commission of Saskatchewan

Proposals for a Survival of Actions Act

Report to the Minister of Justice


Anno decimo tertio ELIZABETHÆ. C 5 [1570.]

CAP. V.

An act against fraudulent deeds, alienations, &c.

Fraudulent deeds made to avoid the debts

FOR the avoiding and abolishing of feigned, covinous and fraudulent feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgements and executions, as well of lands and tenements as of goods and chattels, more commonly used and practised in these days than hath been seen or heard of heretofore (1) which feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgements and executions, have been and are devised and contrived of malice, fraud, covin, collusion or guile, to the end, purpose and intent to delay, hinder or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, hindrances, losses and imprisonments, not only to the let or hindrance of the due execution of law and justice, but also to the overthrow of all honest dealing, bargaining and chevisance betwixt the which no commonwealth or [illegible] continues

All fraudulent conveyances of lands to avoid debts

therefore declared, ordained and enacted by this present parliament, That all and every feoffment, gift, grant, alienation, bargain and conveyance of lands, tenements, goods and chattels, or of any of them, or of any rent, common or other profit or charge out of the same lands, tenements, hereditaments, goods and chattels, or any of them, by writing or otherwise, (2) and all bonds, suits, judgements, executions, counts, accounts, reckonings, sum and sums of money, damages, recoveries and reliefs, had, made, suffered, done or to be had, made, suffered or done for any cause, consideration or trust before this time, or hereafter to be had, made, suffered or done, as is aforesaid, which have been, or hereafter shall be devised, practised or contrived, to the intent or purpose to delay, hinder or defraud creditors and others of their just debts, duties, accounts, damages, penalties, forfeitures, suits, debts, recoveries, executions, or any of them, or to defeat or defraud them or any of them of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, hindrances, losses and imprisonments, or any of them, or to delay, hinder or defraud the due execution of law and justice, or to overthrow any honest dealing, bargaining and chevisance betwixt the which no commonwealth or [illegible] continues

The forfeiture of the parties that conveyed

therefore declared, ordained and enacted by this present parliament, That all and every feoffment, gift, grant, alienation, bargain and conveyance of lands, tenements, goods and chattels, or of any of them, or of any rent, common or other profit or charge out of the same lands, tenements, hereditaments, goods and chattels, or any of them, by writing or otherwise, (2) and all bonds, suits, judgements, executions, counts, accounts, reckonings, sum and sums of money, damages, recoveries and reliefs, had, made, suffered, done or to be had, made, suffered or done for any cause, consideration or trust before this time, or hereafter to be had, made, suffered or done, as is aforesaid, which have been, or hereafter shall be devised, practised or contrived, to the intent or purpose to delay, hinder or defraud creditors and others of their just debts, duties, accounts, damages, penalties, forfeitures, suits, debts, recoveries, executions, or any of them, or to defeat or defraud them or any of them of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, hindrances, losses and imprisonments, or any of them, or to delay, hinder or defraud the due execution of law and justice, or to overthrow any honest dealing, bargaining and chevisance betwixt the which no commonwealth or [illegible] continues

III. And be it further enacted by the authority aforesaid, That all and every the parties to such feigned, covinous or fraudulent feoffment, gift, grant, alienation, bargain, conveyance, bond, suit, judgement, execution and other things before expressed, and being privy and knowing of the same, or any of them, which at any time after the tenth day of June next coming shall wittingly and willingly put in ure, avow, maintain, justify or defend the same, or any of them, as true, simple, and done, or made bona fide and upon good consideration, (3) or shall take benefit of all or any the lands, tenements, goods, leases or other things herein mentioned, to him or them conveyed as is aforesaid, or any part thereof, (4) shall incur the penalty and forfeiture

86-0303/

PROPOSALS FOR A SURVIVAL OF ACTIONS ACT

Law Reform Commission of Saskatchewan
Saskatoon, Saskatchewan

Report to the Minister of Justice

May, 1985

The Law Reform Commission of Saskatchewan was established by *An Act to Establish a Law Reform Commission* proclaimed in November, 1973, and began functioning in February of 1974.

The Commissioners are:

Professor DOUGLAS A. SCHMEISER, Q.C., B.A., LL.B., LL.M., S.J.D., Chairman

Madam Justice MARJORIE A. GERWING of the Saskatchewan Court of Appeal

Mr. GORDON J. KUSKI, Q.C., LL.B.

Mr. Kenneth P.R. Hodges, B.A., LL.B. is Director of Research.

Mr. Michael J.W. Finley, B.A., M.A., LL.B., and Mr. C. Peter Thagard, LL.B. are the Legal Research Officers, and Mr. Roderick J. Wood, LL.B., LL.M., Dip. in Legislative Drafting and Mrs. Sandy Antonini-Ready, LL.B. are Legal Research Officers under contract. The secretaries are Mrs. Sandra Ritchie and Miss Pat Harasymchuk.

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The Law Reform Commission Act.

6. The commission shall take and keep under review all the law of the province, including statute law, common law and judicial decisions, with a view to its systematic development and reform, including the codification, elimination of anomalies, repeal of obsolete and unnecessary enactments, reduction in the number of separate enactments and generally the simplification and modernization of the law.

* * * * * * * * * *

Saskatchewan

Law Reform
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The Honourable J. Gary Lane, Q.C.,
Minister of Justice and Attorney
General of Saskatchewan,
Regina, Saskatchewan.

Dear Mr. Minister:

The present law dealing with survival of actions is uncertain and unsatisfactory. In some cases the victim's estate recovers everything the victim could have recovered had he lived; in other cases the estate recovers nothing. Whether lost future earnings can be recovered by the victim's estate is debatable.

The Commission has examined sections 58 to 60 of The Trustee Act which contain the rules governing the survival of actions. As a result of its research, as well as consideration of a number of relevant judicial decisions, the Commission has drafted amending legislation to make our law similar to that of most of the other common law provinces.

The Commission wishes to thank Mr. J.A. Griffin, Q.C. for bringing the inadequacies of the law in this area to its attention.

Pursuant to section 9 of The Law Reform Commission Act, the Commission submits this report recommending enactment of a Survival of Actions Act.

Respectfully submitted this 1st day of May, A.D. 1985.

Douglas A. Schmeiser, Q.C.,
Chairman.

Madam Justice Marjorie A. Gerwing,
Commissioner.

Gordon J. Kuski, Q.C,
Commissioner.

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PROPOSALS FOR A SURVIVAL OF ACTIONS ACT

I. INTRODUCTION

When a person wrongfully inflicts an injury on another, the law gives the victim a cause of action against the wrongdoer which the victim may pursue by bringing an action before a court. If he is successful, the court will render a judgment in his favour. But the victim, or the wrongdoer, or both, may die before the action is commenced or before it is completed. The law concerning the survival of actions[1] in Saskatchewan is in a confused state. It appears that in some circumstances the estate is entitled to recover everything the victim could have recovered had he not died. In other cases the estate can recover nothing.

This report will examine the extent to which the estate of the deceased victim should be entitled to recover damages from the wrongdoer. Conversely, it will examine the extent to which the estate of the wrongdoer should be liable for the acts of the wrongdoer.

This report recommends reform through the adoption of legislation that substantially follows the provisions of the Uniform Survival of Actions Act.

II. BACKGROUND

At common law there was a general rule that an action for damages did not survive the death of either the wrongdoer or the victim. This was often expressed by the Latin maxim *actio personalis moritur cum persona*: a personal right of action dies with the person. In fact, the use of the maxim tended to garble the law.[2] Where the cause of action was money due or founded on a contractual obligation, or where property or its value had been appropriated by a deceased wrongdoer and added to his estate, the action survived. A series of English statutes further modified the rule: actions for injury to property survived.[3] A better expression of the rule was that a personal action on a tort died on the death of the victim or the wrongdoer.

There was a second common law rule, sometimes confused with the first, known as the rule in *Baker* v. *Bolton*.[4] No living person had a cause of action against another for the wrongful killing of a person. Thus, a wife could not obtain damages from a wrongdoer for the wrongful killing of her husband.

It is important to distinguish between these two rules. The first rule provided that the death of a wrongdoer or of a victim extinguished liability for a tort. The second rule - the rule in *Baker* v. *Bolton* - provided that death did not create liability in tort for losses suffered by third parties. The wife could not recover lost income or lost comfort, fellowship and assistance occasioned by the death of her husband.

Both of these rules were modified by legislation before Saskatchewan became a province. The rule in *Baker* v. *Bolton* was cut back in 1846 with the introduction in England of *Lord Campbell's Act*.[5] Its introduction was "rendered imperative by the invention of railways, and the consequent increase

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[1] "Survival of action" in this report means survival of a cause of action for the benefit of the victim's estate and also survival against the wrongdoer's estate. The terms "victim" and "wrongdoer" rather than "plaintiff" and "defendant" are used throughout for convenience.

[2] See P.H. Winfield, "Death as Affecting Liability in Tort" (1929), 29 *Col. L. Rev.* 239, at 244-9.

[3] See P.H. Winfield, "Recent Legislation on the English Law of Tort" (1936), 14 *Can. Bar Rev.* 639, at 643-4.

[4] (1808), 1 Camp. 493; 170 E.R. 1033.

[5] 9 & 10 Vict., c. 93.

in fatal accidents".[6] The Act permitted the spouse and a small circle of close family members to recover pecuniary (financial) loss suffered as a result of the death. This legislation was adopted in the North-West Territories in 1884,[7] and formed the basis for the present *Fatal Accidents Act* of Saskatchewan.[8]

The rule embodied in the maxim *actio personalis moritur cum persona* was reversed by legislation in the Territories, and later by the Province of Saskatchewan, in the following provisions of *The Trustee Act*:[9]

> 30. The executors or administrators of any deceased person may maintain an action for all torts or injuries to the person or to the real or personal estate of the deceased except in cases of libel and slander in the same manner and with the same rights and remedies as the deceased would if living have been entitled to do; and the damages when recovered shall form part of the personal estate of the deceased; but such action shall be brought within one year after his decease.
>
> 31. In case any deceased person committed a wrong to another in respect of his person or of his real or personal property except in cases of libel and slander the person so wronged may maintain an action against the executors or administrators of the person who committed the wrong; but such action shall be brought within one year after the decease.

Tort actions thereafter survived for the benefit of the deceased's estate and against the wrongdoer's estate. This was the state of the law until 1920. During that year the wording of section 30 was changed. As will be seen, this change confused the law in Saskatchewan.

III. A PROBLEM IN INTERPRETATION

Section 30 of *The Trustee Act* was reworded in the 1920 revision of the Saskatchewan statutes. This new wording now appears as section 58 of the present *Trustee Act*.[10] The provision reads as follows:

> 58.(1) The executors or administrators of a deceased person may maintain an action for all torts or injuries to the person not resulting in death, except libel and slander, or to the real and personal estate of the deceased, in the same manner as the deceased might have done if living.
>
> (2) In every such action the judge or jury may give such damages as he or it thinks proportioned to the loss sustained by the estate of the deceased in consequence of wrong committed.
>
> (3) Every such action shall be brought within one year after the death of the deceased.

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[6] Winfield, "Recent Legislation of the English Law of Tort", *supra*, footnote 3, at 646.

[7] O.N.W.T. 1884, No. 12.

[8] R.S.S. 1978, c. F-11.

[9] O.N.W.T. 1903 (2), c. 11, ss. 29 and 30; R.S.S. 1909, c. 46, ss. 30 and 31. These provisions were borrowed from Ontario, which had first enacted such legislation in 1886: see *Statute Amendment Act*, 49 Vict., c. 16, s. 23 amending s. 8 of the *Trustee Act*.

[10] R.S.S. 1978, c. T-23.

The commissioners for revising and consolidating the statutes in 1920 had the authority "to revise and alter the language thereof where necessary or desirable so as to give a better expression of the spirit and meaning of the law but not so as to change the sense of any enactment".[11]

But it seems, in retrospect, that the new wording has indeed changed "the sense of the enactment". Subsection 58(1) modifies the survival of actions rule: an action now survives only where the injuries did not cause the death, that is, where the death was caused by an unrelated event. Subsection 58(2) adds another limitation: the damages recoverable are restricted to the loss sustained by the estate.

Previously, an action survived against the wrongdoer in all cases. A literal reading of subsection 58(1) suggests that an action only survives where the death was not caused by the injuries. The changed wording first received judicial interpretation in *Jensen* v. *C.N.R.*[12] In a very brief judgment, Bigelow, J. decided that subsection 58(1) only prohibits a claim for loss of expectation of life (the shortened life expectancy of the victim) where the injuries result in death; the remainder of the claim apparently survives. No doubt Bigelow, J. wished to construe the provision in a manner that would produce no change in the law. The editorial comment on the case, however, makes the point that if full meaning is given to the words, then it is not merely the claim for loss of expectation of life, but the entire cause of action, that does not survive.[13] Judges in later cases [14] have similarly cast doubt on *Jensen* v. *C.N.R.*

Subsection 58(2) is equally troublesome. A literal reading of the subsection suggests that the estate is restricted to the recovery of pecuniary losses suffered by it. Thus, lost income and medical expenses incurred by the victim would be recoverable because these losses diminish the estate. However, non-pecuniary losses suffered by the victim (such as pain and suffering, loss of amenities, and loss of expectation of life) do not affect the financial position of the estate, and therefore would not be recoverable.

The Saskatchewan Court of Appeal in *Gukert* v. *Kuntz*[15] took a different view. A majority of the Court decided that subsection 58(2) did not prevent the estate from recovering damages for the pain and suffering of the victim. Woods, J.A. indicated that in light of the changes instituted by the revision commissioners, "no change of meaning should be imported into the new words except where the nature of any intended departure from the meaning of the old words is clear".[16] He held that the new wording was not sufficiently clear to effect a change in the law.

The mystery behind the changes made in 1920 can be explained in light of the historical context in which the legislative changes were made. In 1920 it was generally thought that claims for pain and suffering did not survive. In *McGarry* v. *Canada West Coal Co.* the court stated that as the

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[11] *The Revised Statutes Act, 1917*, S.S. 1917 (2nd sess.), c. 71, s. 3. By virtue of *The Revised Statutes of Saskatchewan Act, 1920*, S.S. 1920, c. 2, s. 7, the revision is to be construed as merely being a consolidation and not changing the law, but if the consolidation effects a change then it is to prevail.

[12] [1942] 3 D.L.R. 694 (Sask. K.B.).

[13] The editorial comment is contained in the headnote to *Jensen* v. *C.N.R.*, *ibid.* The editorial comment offers an alternative construction. It suggests that the statute, in confining the survival of actions to "injuries to the person not resulting in death", was "designed to preserve strictly the rule in *Baker* v. *Bolton*". In other words, the provision was worded in this manner to ensure that the provision would not be construed as creating liability for the wrongful killing of a person. Thus, the rewording was not intended to alter the survival of actions rule of the earlier statute. Though plausible, this interpretation has not been accepted.

[14] See the *obiter* comments of Woods, J.A. in *Gukert*, v. *Kuntz*, [1971] 1 W.W.R. 586, at 592, and those of the trial judge, Davis, J. (1969), 67 W.W.R. 756, at 762-3, suggesting that subsection 58(1) abolishes the entire cause of action where death results from injuries inflicted by the wrongdoer.

[15] [1971] 1 W.W.R. 586. The deceased in this case died from a cause unrelated to the injuries inflicted by the wrongdoer. Therefore, the interpretation of subsection 58(1) did not come into question: the action clearly survived.

[16] *Ibid.*, at 593.

"damages would be purely personal to him [the victim], his right of action for them died with him".[17] The same reasoning held true in respect of damages for loss of expectation of life.[18]

Thus, whether the action was brought by the estate under *The Trustee Act* provisions, or whether it was brought on behalf of the dependant under *The Fatal Accidents Act*, recovery in either case was then restricted to pecuniary loss. It is likely that the revision commissioners in 1920 attempted merely to streamline the law. In order to avoid overlap, the provision was redrafted: where the tortious conduct did not cause the death, the right of action survived for the benefit of the estate. But where the injuries result in death, the remedy was to be sought under *The Fatal Accidents Act*.[19] This intent is further evidenced by the marked similarity in language between subsection 58(2) and section 4 of *The Fatal Accidents Act* from which the wording was taken.

The trouble with the 1920 revision was that by changing the wording of the provision, it partially insulated Saskatchewan law from developments that would occur later in other jurisdictions. In 1934 England enacted legislation which provided that tort actions survived for the benefit of the estate.[20] In 1937 the House of Lords considered the effect of this legislation in *Rose* v. *Ford*.[21] The victim in that case was injured and later died as a result of those injuries. The Law Lords decided that the estate was entitled to recover damages for pain and suffering, and loss of expectation of life that might have been recovered by the victim had she not died.

In Saskatchewan, *Rose* v. *Ford* cannot apply to deaths that result from wrongful injuries because subsection 58(1) has abolished such claims. But where the death arises from other causes, *Rose* v. *Ford* applies and the estate may recover non-pecuniary loss suffered by the victim: although the wording of subsection 58(2) suggests that non-pecuniary loss is not recoverable, the Court of Appeal in *Gukert* v. *Kuntz* refused to give any effect to the subsection.

This may lead to rather arbitrary results. If the victim dies from other causes, the estate may recover both pecuniary and non-pecuniary losses suffered by the victim. If, however, the injury causes the death, the survivors are limited to the recovery of pecuniary loss under *The Fatal Accidents Act*. And if the beneficiaries of the estate are not persons entitled to bring an action under *The Fatal Accidents Act*, the estate recovers nothing; it cannot recover expenses incurred or income lost by the victim prior to his death even though these losses diminish the estate.

Furthermore, there is some doubt whether this is in fact an accurate statement of the law. If *Jensen* v. *C.N.R.* is good law, then the estate could in fact recover the expenses incurred or income lost prior to the death. Clearly, reform is required. The judiciary has called for legislative action. Brownridge, J.A. in *Gukert* v. *Kuntz* stated:

> The fact that opinions differ so widely as to what the legislation means is, in my view, the best reason for supporting the judgment of the learned trial Judge and leaving it to the Legislature to provide the necessary clarification.[22]

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[17] (1909), 11 W.L.R. 597, at 598 (Alta. S.C.T.D.)."

[18] *England* v. *Lamb* (1918), 42 O.L.R. 60; 13 O.W.N. 402 (H.C.).

[19] The revision commissioners appear to have overlooked one problem. Only a limited group of family members may recover under *The Fatal Accidents Act*. If the beneficiaries of the estate of the deceased do not fall within this group, then they will be unable to recover the pecuniary loss to the estate.

[20] *Law Reform (Miscellaneous Provisions) Act, 1934*, 24 & 25, Geo. 5, c. 41.

[21] [1937] A.C. 826; [1937] 3 All E.R. 359. Note that the Ontario Supreme Court previous to this had decided in *Bowler* v. *Blake*, [1930] 1 D.L.R. 683 that the claim for pain and suffering of the victim was recoverable by the estate; but it was generally presumed prior to *Rose* v. *Ford* that the claim for loss of expectation of life was not recoverable. See: C.A. Wright, "The Abolition of Claims for Shortened Expectation of Life by a Deceased's Estate" (1938), 16 *Can. Bar Rev.* 193.

[22] *Supra*, note 15, at 595.

The Commission is of the opinion that recovery by the estate should not depend on whether or not the deceased died from the injuries inflicted by the wrongdoer. The revision in 1920 was never intended to produce this result: it is an arid distinction that should not be retained.

It is then necessary to decide what damages should be recoverable by the estate. Clearly pecuniary loss (lost earnings and expenses prior to death) should be recoverable, as this is a direct financial loss personally suffered by the victim. But the more difficult question is whether non-pecuniary loss (pain and suffering, loss of amenities, and loss of expectation of life), and lost future earnings (prospective earnings that would have accumulated if the victim had lived out his normal life expectancy) should be recoverable by the estate.

IV. RECOVERY OF NON-PECUNIARY LOSS

The decision in *Rose* v. *Ford* (which held that the claim for non-pecuniary loss survived for the benefit of the estate), although accepted by Canadian courts,[23] was not otherwise well received in Canada. It was criticized by Wright,[24] and this sentiment has been echoed by a number of authors.[25] Following the decision in *Rose* v. *Ford*, Ontario, British Columbia and Prince Edward Island enacted legislation that excluded the estate's recovery of damages for loss of expectation of life.[26] In 1962 the Uniformity Commissioners proposed a Uniform Survival of Actions Act, which excluded damages for all non-pecuniary loss.[27] This statute was substantially adopted by New Brunswick, Newfoundland, Prince Edward Island, the Yukon and in part by Nova Scotia.[28] In 1977 the Alberta Institute of Law Research and Reform published a report[29] recommending the adoption of the Uniform Act, and this proposal was adopted by Alberta in 1979.[30] In 1977, the Law Reform Commission of Manitoba[31] recommended the abolition of the estate's claim for loss of expectation of life, and this change was implemented in 1980.[32] Only the North West Territories fully permits the recovery of non-pecuniary loss.[33] Saskatchewan, it will be recalled, permits such recovery only where the death does not result from the injuries suffered by the victim. In other Commonwealth jurisdictions, the claim has similarly been restricted. John Fleming states:

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[23] *Crosby* v. *O'Reilly*, [1974] 6 W.W.R. 475 (S.C.C.).

[24] C.A. Wright, "The Abolition of Claims for Shortened Expectation of Life by a Deceased's Estate" (1938), 16 *Can. Bar Rev.* 193.

[25] See Cooper-Stephenson and Saunders, *Personal Injury Damages in Canada*, Toronto: Carswell, 1981, at 399-400; Fleming, *The Law of Torts* 6th ed., Sydney: Law Book Co., 1983, at 638; E.R.E. Carter, "Damages for Personal Injury or Death" (1954), 32 *Can. Bar Rev.* 713, at 760-1. But see *contra* S.M. Waddams, *The Law of Damages*, Toronto: Canada Law Book Ltd., 1983, at 436-50 and 593-607.

[26] *Trustee Act*, R.S.O. 1980, c. 512, s. 38(1); *Estate Administration Act*, R.S.B.C. 1979, c. 114, s. 66(1)(b); *Survival of Actions Act*, R.S.P.E.I. 1974, c. S-13, now repealed and replaced with *Survival of Actions Act*, S.P.E.I. 1978, c. 21. Note that B.C., even before this amendment, provided that a claim for pain and suffering does not survive for the benefit of the estate.

[27] *Proceedings of the Forty-Fifth Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada* (1963), at 136-38. See also W.F. Bowker, "The Uniform Survival of Actions Act" (1964), 3 *Alta. L. Rev.* 197.

[28] *Survival of Actions Act*, R.S.N.B. 1973, c. S-18; R.S. Nfld. 1970, c. 365; S.P.E.I. 1978, c. 21; S.Y.T. 1981, c. 16; R.S.N.S. 1967, c. 298. The Newfoundland Act is based upon an early 1962 draft of the Uniform Act.

[29] *Survival of Actions and Fatal Accidents Act Amendment* (1977), Report No. 24.

[30] *Survival of Actions Act*, R.S.A. 1980, c. S-30.

[31] *Working Paper on Rationalizing Actionable Fatalities Claims and Damages* (1977).

[32] *An Act to Amend The Fatal Accidents Act and The Trustee Act*, S.M. 1980, c. 5, s. 2.

[33] *Trustee Ordinance*, R.O.N.W.T. 1974, c. T-8, ss. 33-35, as amended O.N.W.T. 1976, c. 11.

> Unlike the English act, therefore, all Australian legislation excludes claims for the decedent's non-pecuniary losses. New South Wales, Victoria and the A.C.T. do so only when the death was actually caused by the injury in question, but all others - with more consistency - are of general application and also extend therefore to those, admittedly rarer, instances where death supervenes from some unconnected cause.[34]

It would appear, therefore, that the trend is to prohibit the recovery by the estate of non-pecuniary loss suffered by the victim. P.H. Winfield sets out the argument for this position as follows:

> Where it is the injured party who has died there is something to be said for extinction of an action for a personal tort, for it seems consonant neither with justice nor with the law of tort that a man's successors should profit by a wrong which in origin did *them* no harm; if, however, they are in fact harmed, as might well happen in some cases of defamation of their predecessor, then his remedy ought to survive.[35]

A number of arguments have been marshalled in favour of recovery of non-pecuniary loss by the estate. The earliest was the argument that "it should not be cheaper to kill than to maim". This argument is not particularly forceful. The primary purpose of tort law should not be to punish the wrongdoer, but to compensate the victim. The law of torts is generally unsuited for punishing wrongdoers: a little negligence may result in a great deal of liability, while a great deal of negligence may result in only a little or no liability. Recovery depends on the injuries actually suffered by the victim.

A second argument, put forth by S.M. Waddams, is that "the purpose of the survival legislation is not to compensate survivors for their own losses - that is the function of the Fatal Accidents Act - but to enable the estate to inherit the wealth represented by the deceased's own right of action".[36] He argues that it is anomalous that the victim's death just before trial should deprive the estate of a valuable cause of action.

The Commission, however, is of the opinion that the cause of action in respect of intangible, non-pecuniary losses should not be inheritable. The damages for such losses are a substitute for the "lost happiness" of the victim, and are intended for the victim alone. Once the victim has obtained such damages, he may do with them what he will. He may give them away; it is his choice. But until those damages are awarded him by judgment, no other person should be able to lay claim to them. Accordingly, the Commission proposes that damages for non-pecuniary loss not survive for the benefit of the estate.

There is a growing suspicion that the recovery of damages for the victim's pain and suffering and loss of expectation of life may be a disguised award to the victim's close relatives for the grief they suffer. But, as Fleming points out, "[i]f close relatives deserve recognition of their grief, it should be done openly by awarding a *solatium* rather than by this stratagem".[37] An increasing number of

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[34] *The Law of Torts, supra*, note 25, at 638-9.

[35] "Recent Legislation on the English Law of Tort" (1936), 14 *Can. Bar Rev.* 639, at 649.

[36] *The Law of Damages, supra*, note 25, at 596.

[37] *The Law of Torts, supra*, note 25, at 638. Even so, it is a rather ineffectual stratagem because dependants who bring a fatal accidents action must account for any benefits obtained by virtue of the survival of actions legislation: see *Gallant* v. *Boklaschuk* (1978), 90 D.L.R. (3d) 370 (Man. Q.B.). The Manitoba Law Reform Commission, however, has argued that a deduction should not be made because the rights conferred on the estate are expressed to be in addition to, and not in derogation of, any rights conferred by *The Fatal Accidents Act*. See *Working Paper, supra*, note 31, at 24-33.

provinces have recently given direct recognition to this type of claim.[39]

V. RECOVERY OF LOST FUTURE EARNINGS

It is important to distinguish between lost earnings suffered before death, and lost future earnings (i.e., those prospective earnings that would have been accumulated had the victim not been killed, but had lived out his normal life expectancy). Lost future earnings are recoverable by certain dependants under *The Fatal Accidents Act*. It is debatable whether lost future earnings are also recoverable under survival of actions legislation.

Until recently it appears generally to have been thought that the provincial survival of actions legislation precluded the claim to lost future earnings.[39] Some doubt has now been cast on this assumption. Again the difficulty is a result of a House of Lords decision. The Law Lords in *Gammel* v. *Wilson*[40] held that the estate was not precluded from recovering the victim's lost future earnings. Waddams notes that many of the survival of actions statutes are either silent on the point, or permit recovery only of "actual pecuniary loss". He indicates that a strong argument may be made that lost future earnings are recoverable.[41] If *Gammell* v. *Wilson* were accepted in Saskatchewan, the result would be that the estate could recover lost future earnings if the death was not caused by the injuries, but could not do so if the death resulted from the injuries.

The House of Lords regretted the result it reached in *Gammell* v. *Wilson*, which it considered to be neither sensible nor just, but felt that change could only be brought about by legislation. The Court also noted the possibility of double recovery if the beneficiaries of the estate are different from the dependants claiming under the fatal accidents legislation. In such a case, the wrongdoer would have to pay out the lost earnings twice: once to the estate and once to the dependants. Shortly after the decision, Parliament intervened and passed legislation that precluded the estate from recovering all posthumous losses.[42] Except in British Columbia where "damages in respect of expectancy of earnings subsequent to the death of the deceased which might have been sustained if the deceased had not died" are excluded,[43] the legislation of all common law provinces may be susceptible to the interpretation in *Gammell* v. *Wilson*.

Clearly the question of lost future earnings should be re-examined. Legal commentators offer four options:[44]

> (1) the claim for lost future earnings should survive, but should be reduced by the amount that the deceased would have spent on himself and his dependants;
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> (2) the claim for lost future earnings should survive, but any benefits obtained by the dependants as a result of their fatal accidents claim should be correspondingly reduced;

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[39] Alberta permits recovery by the dependant of up to $3,000 as damages for bereavement: see the *Fatal Accidents Act*, R.S.A. 1980, c. F-5, s. 8. Ontario and Manitoba permit recovery for lost guidance, care and companionship: see the *Family Law Reform Act*, R.S.O. 1980, c. 152, s.60(2)(d); *The Fatal Accidents Act*, C.C.S.M. F-50, s.4(4).

[39] See Cooper-Stephenson and Saunders, *Personal Injury Damages in Canada*, *supra*, note 25, at 390-91.

[40] [1981] 1 All E.R. 578; [1982] A.C. 27.

[41] *The Law of Damages*, *supra*, note 25, at 604.

[42] *Administration of Justice Act, 1982*, c. 53 (U.K.).

[43] *Estate Administration Act*, R.S.B.C. 1979, c. 114, s. 66(2)(c).

[44] See Cooper-Stephenson and Saunders, *Personal Injury Damages in Canada*, *supra*, note 25, at 389-90; Waddams, *The Law of Damages*, *supra*, note 25, at 602-606.

(3) the claim for lost future earnings should survive, and the fatal accidents legislation should be repealed;

(4) lost future earnings should not be recoverable.

Under the first alternative, the dependants would recover under *The Fatal Accidents Act* lost future earnings that would have been expended for their benefit, and the estate would recover under the survival of actions provisions any savings that would have been accumulated over the life expectancy of the deceased.

The second alternative represents the position in England after *Gammell* v. *Wilson*. It is flawed because of the possibility of double recovery.

The third alternative calls for the repeal of *The Fatal Accidents Act*. Only the estate would be entitled to recover lost future income. The dependants would have no claim against the wrongdoer. Their recovery would be a matter of the law of inheritance. If they have not been adequately provided for, then they may proceed under *The Dependants' Relief Act*.[45]

Under the fourth alternative, the fatal accidents legislation would be the only route by which lost future earnings may be recovered. This was accepted as the position in most provinces prior to *Gammell* v. *Wilson*.

The Commission favours the fourth alternative. It is of the opinion that lost future earnings should be earmarked for the dependants alone. This is the position preferred by J.A. Jolowicz, who indicates that the loss of future earnings "is not that of the deceased but of his dependants".[46]

There are several reasons for adopting this position. If recovery of lost future earnings is permitted by the estate, the assessment of damages becomes increasingly speculative. It is one thing to say that the deceased would have provided for his family. It is rather more difficult to estimate what he would have saved after expenses. Indeed, it is quite possible that the estate may have benefitted from the untimely death if the deceased would have depleted his estate in later years.

In addition, the result in many cases would seem unjust if the estate is allowed to recover lost future earnings. Suppose a young single doctor is killed in an automobile accident. The estate would then recover many years of lost earnings. In making the calculation, the court must speculate whether the deceased would have married and how much would have been saved. And after all this is done, the ultimate recipients of this sum would likely be the parents, or the brothers and sisters of the deceased, who never expected to share in these lost earnings.

There is an element of remoteness in the recovery by the estate of lost future earnings. Many people may suffer loss on the death of another. Family members are denied recovery of their non-pecuniary loss. Others who have a financial interest in the life of the deceased, such as employers, are similarly barred. Damages for lost future earnings are even more tenuous. The beneficiary might not have survived the deceased but for the fatal accident. Or the deceased in later years might have chosen different beneficiaries. There must be strong policy reasons for permitting the recovery of lost future earnings. This requirement is satisfied only where the loss is suffered by dependants who rely on the deceased's future earnings, particularly as the deceased is often legally obligated to support such dependants.[47]

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[45] R.S.S. 1978, c. D-25.

[46] "Damages - Prospective Loss of Earnings - Reduced Expectation of Life", [1960] *Camb. L.J.* 160, at 162.

[47] It may well be that the present *Fatal Accidents Act* is in need of reform. Ontario has recently enacted legislation which substantially recasts the law: see *Family Law Reform Act*, R.S.O. 1980, c. 152, Part V. This legislation could be used as a model for future reform in Saskatchewan.

VI. DEATH OF THE WRONGDOER

To this point this report has examined an action by the victim's estate against the wrongdoer. The effect of the wrongdoer's death will now be examined. For the most part the position is uncontroversial; because the wrongdoer's death in no way affects the victim's loss, the cause of action survives against the wrongdoer's estate.

There is, however, one exception. An award of punitive or exemplary damages is not intended to compensate the victim, "but is solely a recognition of the law's need to impose a financial burden on the defendant in the interests of society".[48] No good purpose is served in "penalising survivors for the sins of the deceased".[49]

Section 59 of *The Trustee Act*, the present Saskatchewan provision, does not expressly abolish claims for exemplary damages against the wrongdoer's estate. Curiously, the Uniform Survival of Actions Act forbids the recovery of exemplary damages by the victim's estate, but permits recovery against the wrongdoer's estate. A number of authors have commented that this rule should be the exact reverse.[50] There is only one circumstance in which it is just to award exemplary damages against an estate. Where the purpose of the award is to strip the wrongdoer of profits arising out of his wrongdoing, the award should survive against the estate. Section 60 of *The Trustee Act* recognizes this, and expressly provides for the recovery of gains resulting from the wrong.

A court must distinguish between aggravated damages and exemplary damages.[51] The former are used to compensate the victim's injured feelings, and as such are a form of non-pecuniary damages that should not survive for the benefit of the estate. Exemplary damages are to punish the wrongdoer, and therefore should survive the victim's death but should not survive against the wrongdoer's estate.

Accordingly, the Commission proposes that a claim against a wrongdoer survive his death, but that a claim for exemplary damages should not survive unless its purpose is to strip the estate of any gains arising out of the wrongdoing.

VII. SUMMARY OF MAJOR PROPOSALS

The Commission recommends that:

(1) An action should survive the death of the victim whether or not the death resulted from the injuries inflicted by the wrongdoer.

(2) An estate should not have a claim for non-pecuniary loss of the deceased.

(3) An estate should not have a claim for lost future earnings of the deceased.

(4) An action should survive the death of a wrongdoer, but a claim for exemplary damages should not survive unless its purpose is to strip the estate of the profits of the wrongdoing.

VIII. THE PROPOSED ACT

Short Title	1.	This Act may be cited as *The Survival of Actions Act*.
Interpretation	2.	In this Act, "cause of action" means the right to institute a civil proceeding or the right to continue a civil proceeding commenced before death, but does not include a prosecution for the contravention of an Act, regulation or bylaw.

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[48] H. Street, *Principles of the Law of Damages*, London: Sweet & Maxwell, 1962, at 139.

[49] Cooper-Stephenson and Saunders, *Personal Injury Damages in Canada*, *supra*, note 25, at 401.

[50] Cooper-Stephenson and Saunders, *ibid.*; Fleming, *The Law of Torts*, *supra*, note 25, at 637.

[51] See *Woytiuk* v. *Low* (1984), 32 Sask. R. 34 (Q.B.).

Cause of action survives for benefit of estate

3. A cause of action vested in a person who dies after the coming into force of this Act survives for the benefit of his estate.

Cause of action survives against estate

4. A cause of action existing against a person who dies after the coming into force of this Act survives against his estate.

Cause of action deemed to exist before death

5. Where a cause of action for damages suffered by reason of an act or omission would have existed against a person had that person not died at or before the time the loss or injury was suffered, the cause of action is deemed to have existed against the person before his death.

Recovery of damages

6. (1) Subject to subsection (2), where a cause of action survives under section 3, only those damages that resulted in actual pecuniary loss to the deceased or his estate are recoverable, and without restricting the generality of the foregoing, aggravated damages or damages for loss of expectation of life, loss of expectancy of earnings subsequent to death, pain and suffering, physical disfigurement or loss of amenities are not recoverable.

(2) Where a cause of action survives under this Act, punitive or exemplary damages are only recoverable from:

(a) the person against whom the cause of action exists;

(b) the estate of a deceased person against whom the cause of action exists if the award of damages is in respect of a gain obtained by the deceased as a result of his wrongful conduct.

Calculation of damages

7. Where the death of a person was caused by an act or omission that gives rise to a cause of action, the damages shall be calculated without reference to a loss or gain to his estate consequent on his death, but reasonable funeral expenses may be included in the damages awarded.

Cause of action asset or liability

8. A cause of action that survives under this Act and a judgment or order on it or relating to the costs of it is an asset or liability, as the case may be, of the estate of which or against which the cause of action was taken or the judgment or order made.

Administrator ad litem

9. (1) Where a cause of action survives under this Act and there is no personal representative of the deceased person against whom the action may be brought or contined in Saskatchewan, the Court of Queen's Bench or the Surrogate Court:

(a) on the application of a person entitled to bring or continue the action; and

(b) on such notice as the court considers proper;

may appoint an administrator ad litem of the estate of the deceased person; and the action may be brought or continued against the administrator ad litem and defended by him.

(2) An administrator ad litem appointed under subsection (1) may take any steps that a defendant may take in an action, including third party proceedings and the bringing, by way of counterclaim, of any action that survives for the benefit of the estate of the deceased person.

(3) A judgment obtained by or against the administrator ad litem has the same effect as a judgment in favour of or against the deceased person or his personal representative, as the case may be, but has no effect for or against the administrator ad litem in his personal capacity.

Limitation period

10. (1) Notwithstanding *The Limitation of Actions Act* or any other Act limiting the time within which an action may be brought, a cause of action that survives under this Act is not barred until the expiry of the period provided by this section.

(2) Proceedings on a cause of action that survives under section 3 or 4 may be brought:

(a) within the time otherwise limited for the bringing of the action; or

(b) within one year from the date of death;

whichever is the longer period.

(3) Proceedings on a cause of action that survives under section 5 may be brought:

(a) within the time otherwise limited for the bringing of the action, which shall be calculated from the date the damage was suffered; or

(b) within one year from the date the damage was suffered;

whichever is the longer period.

(4) Subject to subsection (5), this Act does not operate to revive any cause of action in or against a person that was barred at the date of his death.

(5) Any enactment that permits an action to be instituted by way of counterclaim or third party proceedings after the expiry of the time otherwise limited for the bringing of the action applies with respect to proceedings under this Act.

Crown bound

11. The Crown is bound by this Act.

Rev. Stat. c.T-23 sections 58-60 repealed

12. (1) Sections 58 to 60 of *The Trustee Act* are repealed.

Rev. Stat. c.L-15 subsection 3(4) repealed

(2) Subsection 3(4) of *The Limitation of Actions Act* is repealed.

IX. COMMENTARY TO THE PROPOSED ACT

The proposed Act is a modified version of the Uniform Survival of Actions Act. The provisions of this Act, and the modifications to it, are discussed below.

Section 2

Section 2 confirms that the Act applies whether or not an action has actually been commenced.

Sections 3 & 4

Sections 3 and 4 set out the general rule that an action survives for the benefit of the victim's estate and also against the wrongdoer's estate. This is, however, limited by section 6, which restricts the damages that are recoverable.

Subsection 3(2) of the Uniform Act provides that:

> The rights conferred by subsection (1) are in addition to and not in derogation of any rights conferred by The Fatal Accidents Act.

This provision has been deleted as it may suggest that damages awarded under fatal accidents legislation can never be reduced on account of benefits obtained under this section (see footnote 37). In fact, a deduction should be made if it represents a real gain to the dependant that he would not otherwise have obtained.

Section 5

Section 5 provides for the case where the wrongdoer dies before the cause of action arises. Many causes of action arise only upon proof of damage. If the wrongdoer dies before the damage has manifested itself, there is no cause of action against the wrongdoer to which section 4 can apply. Section 5 saves such a claim by deeming the cause of action to have existed against the person before his death.

Section 6

Subsection 6(1) provides that the claim for non-pecuniary losses does not survive for the benefit of the victim's estate. The Uniform Act is modified by adding "aggravated damages" to the list of non-pecuniary losses. The Uniform Act is also modified by adding "loss of expectancy of earnings subsequent to death" to the list. This wording is taken from the British Columbia statute, and expressly excludes lost future earnings (the Uniform Act merely relies on the words "actual pecuniary loss" to achieve this result).

Subsection 6(2) rejects the position taken by the Uniform Act, which provides that punitive damages survive against the wrongdoer's estate but do not survive for the benefit of the victim's estate. Because the function of punitive damages is to punish the wrongdoer, the position should be exactly the reverse. The one exception is where the purpose of the award is to remedy unjust enrichment. In this case the award should survive against the wrongdoer's estate.

Section 7

Section 7 provides that the damages are to be calculated "without reference to any loss of gain to the estate consequent on his death". Thus, the "gain" to the estate by virtue of life insurance, guaranteed annuity payments and pension contribution is not to be considered. Nor are losses such as the costs of administration of the estate to be considered. The one exception to this is reasonable funeral expenses, which are recoverable.

Section 8

Section 8 provides that an action that survives or a judgment on it is to be considered an asset or liability. This is simply to ensure that they are properly considered in the administration of the estate.

Section 9

Section 9 provides a mechanism for appointing an administrator ad litem where the wrongdoer has died and there is no personal representative against whom the action can be continued or brought.

Section 10

Section 10 sets out the limitation period in respect of a survival action. Subsection 10(5) is intended to incorporate the provisions of statutes, such as subsection 143(2) of *The Vehicles Act*, which permit counterclaims or third party proceedings after the expiration of the 12-month period for motor vehicle accident cases.

The inclusion of this section replaces the limitation provisions in *The Trustee Act* as well as subsection 3(4) of *The Limitation of Actions Act*. Accordingly, a single limitation provision applies to both actions by estates and actions against estates.